STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

KIRT BIERLEIN, Conservator for SAMANTHA C. BIERLEIN, a minor, and NORMA R. BIERLEIN, as Next Friend of SAMANTHA C. BIERLEIN, a Minor, and

Plaintiffs/Appellants,

v

Michigan Supreme Court Docket No.
Lower Court Case No. 96-013292-NI

Saginaw
L. Heathscott

MARK SCHNEIDER and MARY SCHNEIDER, ~~Jointly and Severally,~~

Defendants/Appellees. dc

COA 259519

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APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF PLAINTIFF, KIRT BIERLEIN, CONSERVATOR FOR SAMANTHA C. BIERLEIN, A MINOR

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STATEMENT OF QUESTION INVOLVED

DID THE LOWER COURT ERR IN DENYING THE PLAINTIFF CONSERVATOR'S MOTION TO ENFORCE THE SETTLEMENT ON BEHALF OF A MINOR CHILD WHEN THE ORIGINAL SETTLEMENT WAS NOT CONCLUDED IN CONFORMITY WITH EITHER MCLA §700.5102 OR MICHIGAN COURT RULE 2.420?

Plaintiff-Appellant answers this question "Yes."

Defendants-Appellees answer this question "No."

INTRODUCTORY STATEMENT IDENTIFYING THE ORDER APEALED FROM AND RELIEF SOUGHT

No civil action settlement proceeding has more built-in safeguards than does a settlement for a minor child. By statute (MCLA §700.5102) and court rule (MCR 2.420), both judges and attorneys are charged with the dual responsibility of (1) settling "fairly" – with the best interests of the minor child in mind – and (2) settling "securely" – making certain that the settlement proceeds are properly paid and safely invested. This appeal involves a settlement proceeding in which both the court and counsel neglected to follow the rules, resulting in the total loss of the settlement for the minor child. It is a case of first impression for this Court.

On May 17, 2001, this writer was appointed as guardian ad litem by Circuit Judge Fred L. Borchard to investigate the circumstances surrounding a July 1997 settlement, and to determine the whereabouts of any of the proceeds from that settlement. The investigation showed that at the conclusion of the settlement hearing, then Circuit Judge Patrick Meter had approved of the settlement after conducting an in-chambers hearing, where the minor child was not in attendance. The Court signed and entered the order of dismissal which was presented by defendant's counsel, upon representation by Plaintiff's counsel that a conservator was to be appointed "very shortly." The settlement check was delivered by Defendant's counsel to Plaintiff's counsel, endorsed and was never seen again.

No conservator was appointed. Plaintiff's counsel, Patrick Collison, represented to the Plaintiff minor's mother and Next Friend that the funds were invested for the minor child's future needs. In fact, the funds were never invested and were used by Attorney Collison for his own purposes.

On March 1, 2002, this writer filed a motion with the Circuit Court, requesting that the court reopen the settlement proceedings in order to determine whether the settlement was, in fact, in the best interests of the minor child. If the court determined that the settlement was in the child's best interests, it was requested that the court enforce the settlement and order payment to the newly-appointed conservator/father of the minor.

On June 21, 2002, Judge Borchard ordered the case to be re-opened. Defendants appealed to the Michigan Court of Appeals, and leave was granted on October 25, 2002. By decision and order of January 20, 2004, the Court of Appeals reversed the Circuit Court (Docket No. 242547) and remanded to the Circuit Court. Defendants filed a motion for reinstatement of the 1997 order of dismissal, and Plaintiff filed a motion for enforcement of the settlement, which was included in his original request for relief in the March 1, 2002 motion to the Circuit Court. Circuit Judge Lynda Heathscott, who had replaced Judge Borchard, ordered the settlement reinstated, dismissed the case and refused to enforce the settlement under the requirements of MCR 2.420.

Plaintiff filed for leave to appeal to the Court of Appeals on December 2, 2004. Leave was denied by order of May 12, 2005.

Considering the clear mandatory safeguards which are contained in MCR 2.420, it was error for the Circuit Court to refuse to enforce the settlement terms and to order payment of the settlement to the minor child's conservator, even if the discovery of the improper payment and Plaintiff's counsel's embezzlement occurred years after the settlement. If the fundamental purpose of MCLA §700.5102 and MCR 2.420 is to preserve the integrity of the process through which minor children's settlement funds are administered and preserved, then the Circuit Court's

decision is in error. The Circuit Court's refusal to enforce the settlement presents a question which merits review by this Court. Without review and determination by this Court, the minor child will have no recourse to recover for the head injuries which she sustained.[1]

1 In prior hearings before the Circuit Court and Court of Appeals, this writer has been questioned regarding the other sources of recovery for the Plaintiff. Attorney Collison, who is in prison, has no assets. He had no legal malpractice insurance. Samantha was one of many clients who was defrauded by Collison, and the Michigan State Bar Client Protection Fund has received in excess of 20 claims, which total far in excess of the Fund's total liability of $150,000.00. If she recovers anything, it will amount to pennies on the dollar.

STATEMENT OF FACTS

This personal injury action was first filed in May 1995 to recover for head injuries which were sustained by the minor child, Samantha C. Bierlein, as the result of an automobile accident. Suit was filed by her mother, Norma Bierlein, as Next Friend. A settlement of the case was ultimately reached in the amount of $55,000.00. The settlement check was made payable to the Next Friend and to the Plaintiff's original attorney, Patrick Collison. No conservator was appointed prior to entry of the Order of Dismissal by the Circuit Court. Plaintiff's counsel took charge of the settlement proceeds, assured the Next Friend that they were being safely kept for the minor child, and ultimately used the funds for his own purposes. (Attorney Collison has since been sentenced in a separate criminal proceeding and is serving a prison term.)

During the original settlement proceeding which took place in July 1997, Judge Patrick Meter, then Circuit Judge, inquired whether a conservator had been appointed to receive the settlement proceeds. MCR 2.420 then as now required appointment of a conservator and posting of a bond prior to dismissal of the civil action. After finding that the settlement was fair, Judge Meter noted: "And I take it a conservator has been appointed." Attorney Collison responded that "there will be one very shortly." The court then signed the order dismissing the case. (Transcript of proceedings, July 28, 1997, **Exhibit A**, at 11.)

No conservator was appointed. No bond was posted. The Order of Dismissal which had been prepared by the Defendant's counsel (**Exhibit B**) did not even require appointment of a conservator. That order simply approved the settlement and dismissed the case.

In April 2001, Plaintiff's mother, Norma Bierlein, brought to the attention of the Circuit Court that she had called attorney Collison's office on multiple occasions, requesting copies of documents which showed where the settlement funds had been invested. "I have no copies of

anything, no information on where the money is, who is handling the money, . . . " (Transcript of Motion to Show Cause, May 1, 2002, **Exhibit C**, at 2.) Attorney Collison, who was present at the hearing, represented to the court as follows:

> "The money had – there was a – I – when we settled the case, I told Norma and Kirt [the Plaintiff's father] that the money had to be deposited into a restricted account. There was a firm that I had used in the past where they took care of getting the people appointed conservator, and the money was – that's my recollection. It's been 4 years ago. . . .
>
> . . . and I just assumed that this – they were getting statements all along. I didn't know anything about it, your honor, until – I was on vacation 2 weeks ago, and when this issue arose that there was an issue as to the settlement funds. So I don't have anything to add to the court until I can make some phone calls or . . .
>
> The Court: What was the name of the firm that got the money?
>
> Mr. Collison: Judge, I can't tell you that off – I just don't know the name of the person. It wasn't a law firm. They – it was some type of an investment firm, and they used people to set up a conservatorship."

(**Exhibit C**, at 4.)

The Show Cause Hearing ended with the court ordering the parties and counsel to reappear on the following Monday.

On May 7, 2001, the court reconvened. Mrs. Bierlein indicated to the court that she had never received any of the settlement proceeds (Proceedings of May 7, 2001, **Exhibit D**, at 5), and that while she remembered signing settlement papers, she did not remember endorsing the settlement check. (Id at 7).

Attorney Collison on his part represented to the court that the settlement funds had been deposited with NBD Bank, and that he was attempting to determine where the settlement funds were now located. On May 10, 2001, Circuit Judge Fred L. Borchard, determining that the case

had been improperly dismissed on July 28, 1997, ordered that the case be reopened, Nunc Pro Tunc. (Order Reopening Nunc Pro Tunc, May 10, 2001, **Exhibit E**). He then appointed a Guardian Ad Litem on May 17, 2001 to prepare a report regarding the whereabouts of the settlement proceeds. (Order Appointing Guardian Ad Litem, May 17, 2001, **Exhibit F**).

On June 6, 2001, the court held another Show Cause hearing after the court was notified that attorney Collison had attempted suicide by driving his motor vehicle into a tree at a high rate of speed. Judge Borchard observed the following:

> "The Court understands there is an ongoing criminal investigation by the Michigan State Police. I believe there has been grievances filed in this matter. I should say "in matters," not necessarily this matter, in regards to whether or not one has been filed in regards to this particular case.
>
> The Court in this matter has set aside the Order of Dismissal by an order dated May 10, in that the - - based on the complaint and the review by the Court concerning non-payment of funds, **the Court has determined that this matter was improperly dismissed in July of 1997. The matter is, therefore, reinstated. The Court does not consider this matter dismissed.**
>
> The Court record also reflects there is **no order distributing funds or approving the breakdown of the funds** that had been commented on at the settlement hearing before Judge Meter."

(Transcript of June 6, 2001 Hearing, **Exhibit G**, at 11.)

On October 17, 2001, Kirt Bierlein, the father of the minor child, was appointed as Conservator. The Conservator then filed a Motion to reopen the proceedings and to evaluate the July 28, 1997 settlement terms. (Motion of Kirt Bierlein, Conservator, to Reopen the Proceedings and to Re-evaluate the July 28, 1997 Settlement Terms, **Exhibit H**). In the alternative, the Conservator requested that if the settlement was determined to be proper, Plaintiff conservator requested that the settlement be enforced. The motion to reopen the settlement proceedings was granted by the Circuit Court on June 21, 2002, under an Opinion and

Order Granting Motion to Reopen the Settlement Proceedings. (**Exhibit I**). The alternative request to enforce the settlement was therefore not addressed.

Defendants appealed by leave to the Court of Appeals, which was granted on October 25, 2002. The issue before the Court of Appeals on Defendants' Leave to Appeal was whether the Circuit Court could vacate the July 28, 1997 Order of Dismissal under MCR 2.612(C)(1) and its subsections, and then review the settlement terms to determine whether it was a fair settlement. In the Court of Appeals' decision of January 20, 2004, it held that the trial court erred in setting aside the settlement because the requirements of MCR 2.612(C)(1) were not met. No decision was made regarding the enforcement of the settlement in view of the failure to follow MCLA 700.5102 and MCR 2.420.

Following the Court of Appeals' January 20, 2004 Decision and Order Remanding to the Circuit Court, Defendants filed their Motion for Entry of Order in Conformity with the Court of Appeals Decision reinstating dismissal (**Exhibit J**). The Plaintiff Conservator filed his response to the motion for entry of order reinstating dismissal and also renewed his motion to enforce settlement (**Exhibit K**). Plaintiff also filed a proposed order reinstating dismissal which allowed for enforcement of the original settlement which had not been paid to the Conservator as required by statute and court rule (**Exhibit L**).

On October 25, 2004, Circuit Judge Lynda Heathscott, to whom the case had been reassigned, denied the Plaintiff's Motion for Enforcement of the Settlement and reinstated dismissal of the case pursuant to this Court's opinion of January 20, 2004 (Order Reinstating Dismissal, November 15, 2004, (**Exhibit M**).

Although no opinion was issued by the Circuit Court, Judge Heathscott, in denying the Plaintiff's Motion for Enforcement of the Settlement, made reference to a portion of the Court of

Appeals Opinion of January 20, 2004, where it was stated:

> "Although Plaintiff's original attorney appears to have absconded with Samantha's share of the money, through no fault of Plaintiff, there are other options available to recover the money. The settlement here was on the record, the judge approved it, and the Next Friend agreed to the amount. **Plaintiff was aware at that time that a conservator had not been appointed, and yet she still agreed to the settlement.**" (Emphasis supplied)

ARGUMENT

THE CIRCUIT COURT ERRED BY DENYING PLAINTIFF'S MOTION TO ENFORCE THE SETTLEMENT WHICH HAD BEEN APPROVED BY THE COURT ON JULY 28, 1997.

A. Standard of Review

A trial court's decision on a motion to enforce settlement is reviewed under the clear procedural requirements which are provided in MCR 2.420 for the settlement of minor children's claims.

B. Analysis

Although the Michigan Court Rules do not provide specific guidance for correcting a procedural error such as the Court made in entering the July 28, 1997 order of dismissal, it is submitted that the overriding principals behind the Michigan Court Rules require reversal of that portion of the Circuit Court's Order which denies enforcement of the July 28, 1997 Settlement. The Michigan Court Rules begin with the general caveat that:

> "These rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." (MCR 1.105)

In applying each court rule, courts must ensure that these principles are carried out.

With respect to settlements for minors, however, judges and litigants are not left to fashion the "just, speedy, and economical determination" of the action. Instead, this Court, through the Michigan Court Rules, has carefully crafted a procedure whose sole purpose is to ensure that the settlement for a minor child is fair and is securely set aside and protected for the

minor child's future needs. The court rules do not place the onus on mothers or fathers to know whether or not the required settlement procedures have been followed. It is the Court's responsibility to ensure that the procedures have been followed. . Circuit Judge Heathscott was clearly incorrect in concluding otherwise.

Although the issue has never been squarely decided by this Court, the question of whether a probate estate must be opened in order to receive a settlement in excess of $5,000 has been discussed in Michigan appellate decisions. For example, in In Re Contempt of Auto Club Insurance Association, 243 Mich. App. 697, 624 N.W.2d 443 (2001) the Michigan Court of Appeals, in considering whether the Circuit Court had abused its contempt powers when the defendant Automobile Club refused to issue a settlement check until a probate estate had been opened, observed as follows:

> "On appeal, Goudy and ACIA insist that Algarawi had to open a probate estate to receive a settlement of this size. If we were forced to decide this issue – and we are not – **we would be inclined to agree that the plain language of MCR 2.420(4)(a) required her to open a probate estate.**" (243 Mich. App. at 701) (Emphasis supplied)

In addition to citing MCR 2.420 and MCLA §700.403 (now MCLA §700.5102), the Court of Appeals also cited the case of Smith v. YMCA of Benton Harbor, 216 Mich. App. 552, 550 N.W.2d 262 (1996). In that case, the appellate court was asked to determine whether a parent could compromise a minor child's claim outside of the provisions of MCR 2.420. In ruling that a parent could not compromise a minor child's claim without following the clear dictates of the court rule and statute, the Court stated as follows:

> "The obvious basis for such a rule is to ensure that the best interests of the minor are protected by (1) the appointment of a Next Friend, Guardian, or Conservator to represent the minor and (2) the oversight of the trial court, or probate court, before an action is commenced, to scrutinize any proposal that compromises

the minor's rights." (216 Mich. App. at 556)

In cases where a civil action has not yet been filed, the Michigan appellate decisions have also ruled that the provisions of MCLA §700.403 (now MCLA §700.5102) must be strictly followed. Commire v. Automobile Club of Michigan, 183 Mich. App. 299, 454 N.W.2d 248 (1990).

The cases which have addressed minor children's settlements have followed a consistent theme. In Bowden v. Hutzel Hospital, 252 Mich. App. 566, 652 N.W.2d 529 (2002) the Court of Appeals observed the following:

> "Although contract principles govern settlement agreements, a settlement agreement is not enforceable if it does not also satisfy the requirements of any relevant court rule. Michigan Mut. Ins. Co. v. Indiana Ins. Co., 247 Mich. App. 480, 484-485 N.W.2d 232 (2001)."
>
> (252 Mich. App. At 571)

The court went on the rule that:

> "Recognizing that a parent has no authority to compromise an unliquidated claim or to liquidate a claim on behalf of a child absent the formal procedures and proper supervision suggested by the court rule, it is self-evident that MCR 2.420 seeks to protect an interested minor child's rights in settlement of a claim. Smith v. YMCA of Benton Harbor/St. Joseph, 216 Mich. App. 552, 556, 550 N.W. 2d 262 (1996) (emphasis omitted). With that fundamental purpose in mind, the procedures outlined in subsection B are thus designed to maintain the integrity of the process through which guardians and other individuals work toward settling claims on a minor's behalf in a manner commensurate with the minor's best interest." Id. 572.

In the present case, the Circuit Judge in the July 1997 settlement hearing did pass on the fairness of the settlement. That issue is now at rest. The Court also inquired as to whether a conservator had been appointed. That inquiry was also required under MCR 2.420. But the Court did not go far enough. MCR 2.420(B)(3) requires that the case cannot be dismissed "until the court receives written verification from the probate court that it has passed on the sufficiency

of the bond" of the conservator, and that the bond has been filed with the court. Furthermore, the settlement amount cannot be paid until a conservator has been appointed. (MCR 2.420(B)(4)(a)) These are requirements, not suggestions.

Payment to the parent of a minor (MCLA §700.403, now MCLA §700.5102) is only allowed in situations where the amount of the settlement is less than $5,000.00. Settlements over that amount must be paid to the conservator.

The Circuit Court's decision denying Plaintiff's motion to enforce payment of the settlement to the conservator (who was first appointed in 2001) disregards the clear mandate of MCR 2.420. The Court arrived at its decision by essentially putting the onus for insuring that the court rules have been complied with on either the minor child or on the child's parent. However, if Michigan's courts will not permit the parent to compromise a child's claim, as the Court of Appeals noted in Smith v. YMCA of Benton Harbor, supra, 216 Mich. App. at 557, under what theory of law could that same parent be charged with the responsibility of insuring that the court rules and probate code requirements for securing the safety of settlement funds have been complied with, for the minor child's welfare? The simple, but correct answer, is that we as lawyers and judges cannot allow such an injustice to occur.

If Michigan courts desire to protect minors' rights in litigation, both the fairness of the settlement and the security of the settlement must be supervised by the courts. In this case, the Circuit Court, with the participation of counsel for the plaintiff and defendants, allowed attorney Collison the opportunity to defraud the minor child. That error cannot go uncorrected. Nor can that error be attributed to the minor child's mother. The minor child, through her conservator, is entitled under MCR 2.420 to require that the settlement be properly paid as a condition of dismissing the civil action.

RELIEF

For all of the above reasons, Plaintiff requests that this Court grant this Application for Leave to Appeal from the lower court's order of November 15, 2004, in order to consider the proper application of MCR 2.420 where, as here the rule has not been complied with and the minor child will otherwise lose the entire settlement. The Circuit Court's order denying enforcement should be vacated so that the Plaintiff can be allowed the opportunity to enforce the settlement as approved.

Respectfully submitted,

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June 16, 2005.